Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

PAUL O. ROHART, M.D.,
Petitioner,

v.

NORTH BROWARD HOSPITAL DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1:

Most hospitals, in the U.S., contract out their need for emergency medicine services to companies that supply these services. These services companies then employ emergency medicine physicians to work in hospital emergency departments. The Petitioner worked as an emergency medicine physician for a services company.

The Circuit Court's order stated: "The tort of willful interference with a business relationship does not exist where the defendant [Respondent] was the source of the business relationship interfered with."

When an emergency medicine services company contracts with a hospital to supply emergency department medical services and then hires physicians to deliver these services, who is the source of the employment relationship between the physician and services company – the hospital or the services company?

Question 2:

Florida is one of the few states that explicitly mandate the participation of physicians in investigating and reporting adverse patient medical incidents and medical errors.

Should a governmental agency be granted the protection of sovereign immunity when the agency's actions caused the termination of a physician because he investigated the unexplained death of his patient?

Question 3:

The Supreme Court of the State of Florida lacks jurisdiction to review a per curiam affirmance that contains no opinion and merely cites a case [a citation PCA], even if the decision is in conflict with a decision of another District Court of Appeal or of the Supreme Court. *See Dodi Pub. Co. v. Editorial America*, 385 So.2d 1369 (Fla. 1980). Likewise, a party may not use the court's extraordinary writ jurisdiction to obtain review of a citation PCA. See *Persaud v. State*, 838 So.2d 529 (Fla. 2003).

When a decision without an opinion is made, Florida's Rules of Appellate Procedure, at Rule 9.330(a), allow a party, in a motion for rehearing, to request a written opinion when the party believes it would provide a legitimate basis for Supreme Court review.

Can a District Court of Appeal ignore State Statute and State Supreme Court precedent, issue a decision without an opinion, and then refuse to issue an opinion when requested to do so without denying the Petitioner due process and equal protection under the Law?

PARTIES TO THE PROCEEDINGS

Petitioner

Paul O. Rohart, M.D is an emergency medicine physician.

Respondent

North Broward Hospital District [NBHD] is a governmental hospital district, supported by tax revenue, in Broward County, Florida. Its current name is Broward Health.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Fourth District Court of Appeal, West Palm Beach, Florida. With government becoming more involved in healthcare, the issues presented in this Petition will be recurring.

OPINIONS BELOW

Fourth District Court of Appeal affirmance: App A. Circuit Court decision granting summary judgment: App B. Fourth District Court of Appeal denial of rehearing: App C. Florida Supreme Court dismissal: App D.

JURISDICTION

Florida's Fourth District Court of Appeal denied Petitioner's motion for rehearing on September 3, 2010. Florida's Supreme Court dismissed Petitioner's request for review on September 16, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the U.S. Constitution reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Equal Protection Clause of the U.S. Constitution reads: "... or deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Article V, § 3(b)(3) of the Florida Constitution: The Supreme Court "[m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." A per curiam affirmance without an opinion is unreviewable because it does not expressly conflict with another appellate decision.

Article X, § 13 of the Florida Constitution: "Provisions may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

STATUTE INVOLVED

§ 768.28(1), Fla. Stat., waiver of sovereign immunity in tort actions: "In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts ...."

STATEMENT OF THE CASE

The case addresses the wrongful termination of the Petitioner, Dr. Rohart, from his position as an emergency medicine physician for investigating the unexplained death of his patient in the emergency department of Broward General Medical Center (a part of North Broward Hospital District, Fort Lauderdale, Florida). Dr. Rohart had worked as an emergency medicine physician at North Broward Hospital District for over seven (7) years.

While investigating the unexplained death of one of his patients, Dr. Rohart was told to cease his investigation or the Respondent would demand his termination. After Dr. Rohart reported the circumstances of the patient's death to the District Attorney's Office, an active homicide investigation was begun, and continues. Dr. Rohart had no responsibility for the patient's death. A nurse intentionally gave the patient a massive lethal dose of medication.

Dr. Rohart was terminated.

The case has two Defendants, North Broward Hospital District (NBHD) and Phoenix Emergency Medicine of Broward, LLC (PEMB), the Petitioner's former employer and a supplier of emergency medicine physicians and emergency medicine management services to NBHD. The case has three counts: 1) Wrongful termination in violation of public policy against PEMB, 2) Wrongful termination in violation of Fla. Stat. § 448.101 *et seq.* against PEMB and 3) Tortious interference with a business relationship against NBHD.

NBHD's motion for summary judgment was heard on April 24, 2009.

On June 17, 2009, the Circuit Court ordered that NBHD's motion be granted for the following reasons: 1) "The tort of willful interference with a business relationship does not exist where the defendant was the source of the business relationship interfered with," 2) "the Plaintiff has failed to come forth with any evidence, in opposition to the motion for summary judgment, that the Defendant's actions exceeded the scope of its privilege to protect its own business interests," and 3) "the claim would be barred by § 768.28(9)," the exception to the waiver of sovereign immunity.

The Petitioner did present evidence to the Circuit Court that showed that the Defendant's actions exceeded the scope of any privilege to protect its own business interests. The Petitioner contends that his employer was the source of his employment and any business (employment) relationship interfered with, not NBHD.

On August 4, 2010, the District Court affirmed the Circuit Court's decision without an opinion. The District Court's decision had two citations: 1) *Palm Beach Cnty. Healthcare Dist. v. Prof'l Med. Educ., Inc.*, 13 So. 3d 1090 (Fla. 4th DCA 2009) and 2) *Fla. Tel. Corp. v. Essig*, 468 So. 2d 543 (Fla. 5th DCA 1985).

On August 10, 2010, Petitioner filed a motion for rehearing, and requested a written opinion, but the motion was denied on September 3, 2010. A notice to invoke discretionary review was filed on September 10, 2010. The Florida Supreme Court

dismissed Petitioner's request on September 16, 2010.

REASONS FOR GRANTING PETITION

Litigants should have the right to seek a review, by the Florida Supreme Court, of any decision rendered by a District Court of Appeal. The decision to grant a review should be left to the judgment of the Justices of the Florida Supreme Court and not put beyond their reach because the District Court of Appeal rendered a decision without an opinion. The U.S. Supreme Court is not constrained with respect to its certiorari jurisdiction. Nor should the Florida Supreme Court be constrained.

In 1980, the Florida Constitution was amended to prevent the Florida Supreme Court from reviewing District Court of Appeal decisions made without an opinion. These decisions are referred to as per curiam affirmances [PCA's].

"Between July 1998 and July 1999, PCA's were issued in more than 69 percent of all criminal cases, in more than 65 percent of all administrative appeals, and in more than 45 percent of all civil appeals." Florida Bar Journal, *PCAs in the DCAs*, March 2004, p. 10. Between then and now, the percentages have certainly increased. The significant use of PCA's, in the State of Florida, clearly limits access of its citizens to the justice of the Florida Supreme Court.

Without an opinion, how can an individual know how the law was applied to his or her case?

Without an opinion, the public cannot know what legal precedent was applied. This offends the principle that justice must be rendered in public and subjects the litigants to secret justice. *Ex parte McCarthy*, [1924] 1 K.B. 256, 259 (1923) ("Justice should not only be done, but should be manifestly and undoubtedly be seen to be done."). *Offutt v. United States*, 348 U.S. 11, 14, 99 L. Ed 11, 75 S. Ct. 11 (1954) ("Justice must satisfy the appearance of justice."). The appearance of justice is undermined when an opinion is not given. The use of a PCA denies due process. It also follows that appellate decisions without an opinion create unequal access to the courts. It deprives litigants of effective appellate review. After reviewing a fully briefed appeal, it should not be overly demanding to write a few paragraphs to explain a decision. Not doing this indicates that the court's intent is to insure that further review, within the State, is unavailable for the litigant.

Due to the controversy surrounding the use of PCA's, Florida's appellate rule 9.330(a), governing motions for rehearing, was amended to allow a litigant to request the court issue a written opinion when a decision was entered without an opinion. *Amendments to Florida Rules of Appellate Procedure*, 827 So.2d 888 (Fla. 2002). But, a rule change means nothing when a request for an opinion is ignored.

The use of a PCA should not be used to deprive a citizen of a constitutional and statutory right. The citizens of Florida gave the Legislature the authority to waive sovereign immunity in Article IV, section 19 of the Florida Constitution, which was adopted in

1868. See *Cauley v. City of Jacksonville*, 403 So.2d 379, 381 (Fla. 1981). This constitutional provision is now found in Article X, section 13 of the Florida Constitution. The Legislature exercised this authority in 1973, when it first enacted § 768.28, Fla. Stat. The Supreme Court of the State of Florida has made it clear that the waiver provision of the statute applies to municipalities as well as to state and county governmental entities. *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1016 (Fla. 1979). By enacting the waiver statute, the Legislature declared that the policy considerations for the common law rule of immunity were outweighed by the countervailing public policy of allowing citizens, injured by the tortious acts of government, to sue for recovery of their damages. *Berek v. Metropolitan Dade County*, 396 So.2d 756, 758 (Fla. 3rd DCA 1981).

The use of a PCA should not be used to support the District Court of Appeal's act of ignoring statute and public policy. Florida is one of the few states that explicitly mandate the participation of physicians in adverse medical incident reporting programs. According to §395.0197(1)(e), Fla. Stat., it is␣" . . . *the affirmative duty of all health care providers and all agents and employees of the licensed health care facility to report adverse incidents* . . ." An unexplained death of a patient, in the Respondent's emergency department, would require that the patient's physician investigate to determine the cause of death, and to determine if the death was an adverse incident. Not only must physicians investigate, report and participate within

licensed facilities, but Florida Law mandates reports of adverse incidents in office practice settings for both physicians [§458.351(4), Fla. Stat.] and osteopaths [§459.026, Fla. Stat.]. A physician should not be terminated for doing his duty as a citizen and physician.

POINT ONE: WAIVER OF SOVEREIGN IMMUNITY AND PRECEDENT IGNORED

As there was no opinion, the Petitioner must rely upon the cited cases to divine the logic for the District Court of Appeal's decision.

One of the two cases cited in the District Court's PCA, *Palm Beach Cnty. Healthcare Dist. v. Prof'l Med. Educ., Inc.*, 13 So. 3d 1090, 1095 (Fla. 4th DCA 2009), grants absolute immunity to the Respondent for tortious interference in contradiction to Florida Supreme Court precedent in: *McGhee v. Volusia County*, 679 So.2d 729 (Fla. 1996); *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1995); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979).

The Florida Supreme Court has found that the general waiver statute [§ 768.28, Fla. Stat.] "states that the governmental agency is liable for the negligent or wrongful act or omission of any employee of the agency under circumstances in which the state or agency or subdivision, if a private person, would be liable." *McGhee v. Volusia County*, 679 So.2d 729, 730 (Fla. 1996); § 768.28, Fla. Stat., Waiver of Sovereign Immunity.

The Florida Supreme Court has formulated two tests to distinguish between those discretionary functions of government that are immune from liability and the operating functions which are not immune from liability.

The *Trianon* Test attempts to categorize those government functions for which there is or is not a duty of care under § 768.28, Fla. Stat. *Trianon* Category #4, Providing Professional, Educational, and General Services, is the one that would apply to the instant case. With respect to governmental functions that fall in category #4, tort liability is established because there is a common law duty of care regarding how property is operated and maintained and how professional and general services are performed. *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So.2d 912, 921 (Fla. 1995). Under the *Trianon* Test there is a duty of care that applies to the Respondent under § 768.28, Fla. Stat.

The Florida Supreme Court in the *Commercial Carrier v. Indian River County* case adopted a test consisting of four questions that must be answered on a case-by-case basis. The questions are the following: 1) Does the challenged act, omission, or decision necessarily involve a basic government policy, program or objective? 2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one that would not change the course or direction of the policy, program, or objective? 3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and

expertise on the part of the governmental agency involved? 4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the act, omission, or decision in question can, with reasonable certainty, be classified as a discretionary governmental function, which is immune from tort liability. If the answer to any of these questions calls for or suggests a negative answer, then the activity is an operational function that is not immune from liability. *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1019 (Fla. 1979). In the instant case, the answers to questions 1 thru 3 are negative and, under the *Commercial Carrier* Test, the Respondent's tortious interference is not immune from liability under § 768.28, Fla. Stat.

The District Court of Appeal completely ignored the application of the tests in *Trianon Park Condominium Association, Inc. v. City of Hialeah* and *Commercial Carrier Corp. v. Indian River County* in its analysis in *Palm Beach Cnty. Healthcare Dist. v. Prof'l Med. Educ., Inc.* The District Court did not misapply them, it simply ignored them. The District Court arbitrarily and capriciously decided that *Palm Beach County Healthcare District* should be granted "absolute immunity" because its actions where those "involving a governmental agency's expenditure of funds." *Palm Beach Cnty. Healthcare Dist. v. Prof'l Med. Educ., Inc.* at 1095. All operational activities of

governmental agencies involve the "expenditure of funds." Operational activities are not immune from the waiver of sovereign immunity. The District Court of Appeal, based on Florida Supreme Court precedent, could not grant immunity to the Respondent. District Courts of Appeal must follow Florida Supreme Court precedent. *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973); *State v. Lott*, 286 So.2d 565 (Fla. 1973).

Absolute Immunity is a privilege that may be applied to certain government officials, not a government agency, from claims for damages. "The burden of establishing a claim of absolute immunity is on the public official claiming the immunity. *Butz v. Economou*, 438 U.S. 47, 98 S.CT. 2894, 57 L.Ed.2d 895 (1978); *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982)." *Junior v. Reed*, 693 So.2d 586, 589-90 (Fla 1st DCA 1997). Absolute immunity and/or qualified immunity are affirmative defenses that must be pled and the burden of asserting the defense rests on the governmental official. *Junior v. Reed* at 592. No official of NBHD made a claim for immunity. NBHD did not assert immunity, for an employee, as an affirmative defense. A defense not made, cannot be granted. A defense that case law states may apply only to some government officials cannot be applied to the agency.

"It seems to be settled law of this state that the duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have a remedy by due course of law ... if the judge fails or refuses to

perform that duty." *State v. Smith*, 118 So.2d 792, 795 (Fla. 1st DCA 1960); *Mathews v. Metropolitan Life Insurance Co.*, 89 So.2d 641, 642 (Fla. 1956).

Ignoring the statute granting a waiver of sovereign immunity and ignoring Florida Supreme Court precedent concerning this right has deprived the Petitioner of due process and equal protection. Blocking the Respondent from seeking review, by issuing a PCA, compounds the deprivation.

Further supporting this is the fact that the District Court also ignored District Court of Appeal precedent:

By citing *Florida Tel. Corp. v. Essig*, 468 So.2d 543 (Fla. 5th DCA 1985), the District Court ignored Florida law that addresses the application of a limitation on a claimed privilege: the obligation of an interested party to act properly, justly and fairly. "In fact, Florida Courts have recognized that the privilege to interfere is a valid defense to a claim for tortious interference only where the interference was not done for some improper purpose. See *Morsani v. Major League Baseball*, 663 So.2d 653, 657 (Fla. 2d DCA 1995); *Nizzo v. Amococ Oil Co.*, 333 So.2d 491, 494 (Fla. 3d DCA 1976)." *Burger King Corp. v. Ashland Equities* 161 F.Supp.2d 1331, 1336 (S.D. Fla. 2001); See also *Salit v. Ruden, McClosky, Smith, Schuster*, 742 So.2d 381, 386 (Fla. 4th DCA 1999).

"As stated by Florida's First District Court of Appeal, 'the privilege does not encompass the purposeful causing of a breach of contract.' *Making Ends Meet, Inc. v. Cusick*, 719 So.2d 926, 928 (Fla. 3d DCA 1998) (quoting *McCurdy v. Collis*, 508 So.2d 380, 384 (Fla. 1st DCA 1987)." *Burger King Corp. v.*

Ashland Equities at 1336. The Respondent purposely caused Dr. Rohart's employment contract to be breached.

POINT TWO: PUBLIC POLICY REQUIRED THE PETITIONER TO INVESTIGATE

In retaliation for Dr. Rohart's investigation into the suspicious death of his patient, Respondent demanded that Dr. Rohart be terminated. He was given a letter of termination with 90 days notice on August 15, 2006.

Dr. Rohart continued his investigation into the death of his patient and called the deceased patient's spouse on September 15, 2006. Florida law is specific that "[e]very licensed health care practitioner shall inform each patient, or an individual identified pursuant to s. 765.401(1), in person about adverse incidents that result in serious harm to the patient." § 456.0575, Fla. Stat. Also, § 765.401(1)(b), Fla. Stat., designates the patient's spouse as the appropriate proxy for Dr. Rohart's deceased patient.

For talking to the spouse of his patient, the Respondent demanded that Dr. Rohart be given a letter of immediate termination, on September 15, 2006.

" ... physicians owe a duty of care to patients. Restatement (Third) of Torts Liab. For Physical Harm Tort Liab. For Physical Harm § 41 cmt. H (Proposed Final Draft No. 1 2005)." *Torres v. Sarasota County Public Hospital*, 961 So.2d 340, 344 (Fla. 2nd DCA 2007). This duty of care would include

investigating the unexplained death of a patient. A telephone call to the deceased patient's spouse would be part of exercising this duty.

Florida has also extended a physician's duty to third parties in some circumstances. *Pate v. Threlkel, M.D.*, 661 So.2d 278, 282 Fla. 1985) ("when the prevailing standard of care creates a duty that is obviously for the benefit of certain identified third parties and the physician knows of the existence of those third parties, then the physician's duty runs to those third parties."); *Gill v. Hartford Accident & Indem. Co.*, 337 So.2d 420 (Fla. 2nd DCA 1976) (physician had a duty to warn of patient's contagious disease); *Hoffman v. Blackmon, 241 So.2d 752* (Fla. 4th DCA 1970) (physician had a duty to warn family members of patient's disease). It would follow that an investigation to determine the cause of an unexplained death of a patient would also be a duty that a physician would have. Particularly, if the cause of the unexplained death was something that could possibly impact others, such as future emergency medicine patients at the Respondent's emergency department, as in the instant case.

Dr. Rohart had a right and duty to investigate the unexplained death of his patient and to talk to the spouse of his deceased patient. Public policy supports this. The District Court of Appeal should not have denied the Petitioner the right to the waiver of sovereign immunity and grant the Respondent absolute immunity for its actions when the Respondent's actions clearly violated public policy.

The District Court's actions denied due process and equal protection. The Respondent unjustly and

intentionally interfered with a physician's duty to his patient and the physician's ability to honor his Hippocratic oath.

POINT THREE: RESPONDENT COULD NOT BE THE SOURCE OF THE BUSINESS RELATIONSHIP INTERFERED WITH

Most hospitals, in the U.S., contract out their need for emergency medicine services to companies that supply these services. These services companies then employ emergency medicine physicians to work in hospital emergency departments. The Petitioner was an employee of one of these services companies. This employment scenario affects most emergency medicine physicians working in the U.S. today.

The Circuit Court's decision stated: "The tort of willful interference with a business relationship does not exist where the defendant [Respondent] was the source of the business relationship interfered with." The question is simply - who is the source of the business relationship with which the Respondent interfered? The Respondent forced the Petitioner's employer, Phoenix Emergency Medicine of Broward, LLC [PEMB], to fire Dr. Rohart. The business relationship interfered with was the employment relationship between Dr. Rohart and his employer, PEMB. The Respondent was not the source of this employment relationship. PEMB hired and fired Dr. Rohart.

The Respondent entered into an agreement with the Petitioner's employer. The Petitioner's employer, PEMB, was to supply emergency medicine services for the Respondent. The Respondent paid PEMB for these services. The Respondent did not pay the Petitioner for his work. PEMB scheduled the Petitioner's work, supervised him, and paid the Petitioner for his work. PEMB billed the petitioner for his medical malpractice insurance and PEMB deducted the amount from his paycheck. There was no economic relationship between the Respondent and the Petitioner.

The only opportunity and business relationship afforded the Petitioner was that of employment by PEMB. The Petitioner was not a shareholder in PEMB, and could not be a partner to the business relationship between the Respondent and PEMB.

The Respondent did not have the power to hire or fire the Petitioner. The Respondent had to demand Dr. Rohart's employer fire Dr. Rohart. Florida case law, in *Albritton v. Gandy* , addressed this issue. Mr. Albtritton, a county commissioner, did not have the authority to hire or fire Mr. Gandy and, therefore, the Court held that an action for tortious interference could continue. *Albritton v. Gandy*, 531 So.2d 381, 388-89 (Fla. 1st DCA 1988).

The determination of who is the source of a business relationship is critical to determining whether or not the Petitioner, and others in similar situations, will have access to the tort of intentional interference with a business relationship. By incorrectly, arbitrarily and capriciously attributing

the Respondent to be the source of the employment relationship between the Petitioner and his employer, the lower courts denied the Petitioner due process and equal protection.

POINT FOUR: IF THE COURT DOES NOT GRANT PLENARY REVIEW, IT SHOULD REVERSE THE FOURTH DISTRICT COURT OF APPEAL DECISION AND REMAND THE CASE TO THE CIRCUIT COURT

The issues at stake are important and recurring. They affect the freedom of a physician to exercise his or her duty to a patient. A physician should not be punished, by the State, for exercising the physician's duty to a patient, particularly when statute requires that a physician do so. The issues affect the right of a citizen to obtain access to a State Supreme Court, and the right of a citizen to seek redress for tortious injury by the State.

If the Court does not grant plenary review, it should summarily reverse the Fourth District Court of Appeal decision and remand the case to the Circuit Court for further proceedings. As outlined above, The Fourth District Court of Appeal ignored Florida Supreme Court precedent and statute in its decision. It blocked further review of its decision by issuing a decision without an opinion. The District Court of Appeal then refused to issue an opinion when requested, as allowed by the Rules of Appellate Procedure. The issues in this case should not be decided in secret.

The cases cited by the Fourth District Court of Appeal in its PCA "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Article V, § 3(b)(3) of the Florida Constitution. Supreme Court review should not have been denied.

The Petitioner has been deprived of due process and equal protection.

The Court has held that "virtually all" of the individual rights found in the Bill of Rights apply to the States through the Due Process Clause of the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991). Under the doctrine of selective incorporation, these rights have been applied to the States because they are considered "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DATED AUGUST 4, 2010

DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT
July Term 2010

No. 4D09-2663

[August 4, 2010]

PAUL O. ROHART, M.D.,

Appellant,

v.

PHOENIX EMERGENCY MEDICINE OF BROWARD, LLC, a Florida corporation, and NORTH BROWARD HOSPITAL DISTRICT, d/b/a BROWARD GENERAL MEDICAL CENTER,

Appellees.

PER CURIAM.

Affirmed. See Palm Beach Cnty. Healthcare Dist. v. Prof'l Med. Educ., Inc., 13 So. 3d 1090 (Fla. 4th DCA 2009), *rev. denied*, 34 So. 3d 2 (Fla. 2010); *Fla. Tel. Corp. v. Essig*, 468 So. 2d 543 (Fla. 5th DCA 1985).

Appendix A

GROSS, C.J., WARNER and CIKLIN, JJ., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. CACE 06-19273(14).

William T. Cushing, M.D., Cary, North Carolina, for appellant.

Janine Kalagher McGuire of Conrad & Scherer, LLP, Fort Lauderdale, for appellee, North Broward Hospital District, d/b/a Broward General Medical Center.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA DATED JUNE 17, 2009

IN THE CIRCUIT COURT OF THE
17th JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

JUDGE: THOMAS M. LYNCH IV

Case No. CACE 06 - 19273 (14)

PAUL O. ROHART, M.D.,

Plaintiff,

vs.

PHOENIX EMERGENCY MEDICINE
OF BROWARD, LLC,
a Florida corporation, *et. al.*,

Defendants.

ORDER GRANTING MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court upon the Defendant, North Broward Hospital District's ("the District") Motion for Final Summary Judgment, and the Court having considered said motion and Plaintiff's response thereto, heard arguments of counsel, reviewed the applicable case law and rules of procedure, and being

otherwise fully advised in the premises, hereby finds and decides as follows:

The Plaintiff is suing the District for tortuous interference with a business relationship. "The tort of willful interference with a business relationship does not exist where the defendant was the source of the business opportunity allegedly interfered with." *The Genet Company v. Annheuser-Busch. Inc.*, 498 So.2d 683, 684 (Fla. 3d DCA 1986). Further, the Plaintiff has failed to come forth with any evidence, in opposition to this motion for summary judgment, that Defendant's actions exceeded the scope of its privilege to protect its own business interests and, if it did, the claim would be barred by § 768.28(9). Accordingly, it is

ORDERED AND ADJUDGED that the motion is GRANTED.

DONE AND ORDERED in Chambers, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, Broward County, Florida 33301, this 17 day of June, 2009.

_____

THOMAS M. LYNCH IV.
CIRCUIT COURT JUDGE

APPENDIX C — ORDER OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DATED SEPTEMBER 3, 2010

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES
BLVD., WEST PALM BEACH, FL 33401

CASE NO.: 4D09-2663
L.T. No. : CACE 06-19273 14

September 3, 2010

PAUL O. ROHART, M.D.

Appellant / Petitioner(s),

v.

PHOENIX EMERGENCY
MEDICINE, ETC., ET AL.

Appellee / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed August 10, 2010, for rehearing is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

/s/_____
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

APPENDIX D — ORDER OF THE SUPREME COURT OF FLORIDA DATED SEPTEMBER 16, 2010

Supreme Court of Florida

THURSDAY, SEPTEMBER 16, 2010

CASE NO.: SC10-1776
Lower Tribunal No(s).: 4D09-2663,
CACE06-19273(14)

PAUL O. ROHART

Petitioner(s),

vs.

NORTH BROWARD
HOSPITAL DISTRICT

Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *See Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980).

No motion for rehearing will be entertained by the Court.

/s/_____
Thomas D. Hall
Clerk, Supreme Court

No. 10-683

IN THE

Supreme Court of the United States

PAUL O. ROHART, M.D.,

Petitioner,

v.

NORTH BROWARD HOSPITAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, FLORIDA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the express language of the trial court's order granting summary judgment states that it was based on Florida tort law, not absolute immunity.

II. Whether Petitioner has presented compelling reasons to grant the Petition where Florida law clearly dictates that the risk manager of a hospital has sole authority to conduct an investigation into adverse incidents to patients.

III. Whether Petitioner has presented compelling reasons to grant the Petition where the District, as an interested third party and the source of the business relationship between Petitioner and his employer, cannot be held liable for tortious interference in accordance with Florida law.

IV. Whether Petitioner has presented compelling reasons to grant the Petition where the Florida Supreme Court's dismissal of Rohart's Petition for Writ of Certiorari was based on a lack of discretionary jurisdiction.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Paul Rohart, M.D., is referred to herein as "Rohart" or "Petitioner."

Respondent, North Broward Hospital District, is a special tax district of the State of Florida, and is referred to herein as "the District" or "Respondent." Pursuant to Supreme Court Rule 29.6, Petitioner states Respondent has no parent company and no publicly held company owns 10% or more of Respondent's stock.

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JURISDICTION

The per curium affirmance rendered by the Fourth District Court of Appeal for the State of Florida for which Petitioner seeks review was limited to a question of state law. This case does not involve a Federal question.

CONSTITUTIONAL PROVISIONS INVOLVED

There are no constitutional provisions involved in this case.

STATEMENT OF THE CASE

Respondent, North Broward Hospital District, is a special taxing district of the State of Florida, and as such, is a constitutionally established local governmental entity charged with the responsibility to provide for the "public health ... and good" of the citizens within the district. *Eldred v. N. Broward Hosp. Dist.*, 498 So. 2d 911, 914 (Fla. 1986). The District operates four public hospitals and in order to staff its emergency rooms, entered into a Management Agreement with Phoenix Emergency Medical of Broward, L.L.C. ("PEMB"). Pursuant to the Management Agreement, PEMB staffed the District's emergency rooms by hiring duly licensed physicians as independent contractors.

PEMB entered into an Independent Contractor Agreement (the "Agreement") with Petitioner, Paul Rohart, M.D. Pursuant to the Agreement, Rohart was to perform professional physician services in the emergency room of Broward General Medical Center, one of the District's hospitals. *Id.* Pursuant to the express terms

of the Agreement, Rohart was at all times acting and practicing medicine as the agent of the District, and the District exercised exclusive control and direction over the method and manner by which Rohart performed his professional physician services.

On or about April 23, 2006, a patient named Michelene Plass visited the emergency room at Broward General. Tragically, Mrs. Plass was mistakenly administered a lethal dosage of medication by a nurse working in the emergency room.[1] In accordance with Florida law, the District reported the incident to the Agency for Health Care Administration, and risk management launched a proper investigation.

Notwithstanding the District's investigation of the incident, Rohart launched his own improper and unauthorized investigation into the death of Mrs. Plass. Rohart was told by his superior, Dr. El Sanadi, an employee of PEMB, to cease his unauthorized investigation into Mrs. Plass's death, or he would be terminated. Rohart ignored Dr. El Sanadi's admonition and continued his investigation.

On August 11, 2006, the District entered into a settlement with Mrs. Plass's husband. On September 15, 2006, Rohart contacted Mrs. Plass's husband to discuss the circumstances of his wife's death. Rohart told Mr. Plass not to sign any settlement papers with the District

---

1. Petitioner's assertion that the administration of the lethal dosage of medication was "intentional" has no support in the record and is one of many egregious allegations Petitioner has made during the pendency of this case.

and that he had a lawyer for him. Rohart also asked Mr. Plass if he would speak with Rohart's attorney.

Later that day, Dr. Nabil El Sanadi contacted Broward General Medical Center Risk Manager, Ela Lena, a District employee, and informed her of Rohart's conversation with Mr. Plass. Ela Lena then relayed this information to Joseph Scott, former CEO of Broward General Medical Center. Mr. Scott requested that Dr. Rohart be removed from Broward General Medical Center. PEMB terminated Rohart's services, effective immediately, in accordance with the express terms of the Agreement between Rohart and PEMB.

On November 27, 2006, Rohart filed the instant action against PEMB for wrongful termination; and against the District for tortious interference with a business relationship. On June 17, 2009, the trial court granted the District's Motion for Summary Judgment finding that as a matter of law, "'The tort of willful interference with a business relationship does not exist where the defendant was the source of the business opportunity allegedly interfered with.' *The Genet Company v. Annheuser-Busch, Inc.*, 498 So. 2d 683, 684 (Fla. 3d DCA 1986)." (App. B) On June 24, the trial court entered Final Judgment in favor of the District. *Id.*

Rohart appealed the trial court's decision to the Fourth District Court of Appeal for the State of Florida. The Fourth District affirmed the trial court's decision without opinion, citing as support of its affirmance *Palm Beach Cnty. Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So.3d 1090 (Fla. 4th DCA 2009) and *Fla. Tel. Corp. v. Essig*, 468 So.2d 543 (Fla. 5th DCA 1985), two cases relied

upon by the District. (App. A) Rohart thereafter moved for rehearing in the Fourth District Court of Appeal, which was denied. (App. C) Rohart then filed a Petition for Writ of Certiorari with the Florida Supreme Court. Because the Florida Supreme Court lacked discretionary jurisdiction, Rohart's Petition was dismissed. (App. D)

SUMMARY OF ARGUMENT

Petitioner has failed to present a "compelling reason" for his Petition for Writ of Certiorari ("Petition") to be granted. Specifically, Petitioner has failed to demonstrate that the District was granted absolute immunity on his claim for tortious interference with a business relationship. Moreover, Petitioner has failed to demonstrate that the District was not the source of the business relationship. Thus, the trial court and Fourth District Court of Appeal properly found that the District could not be held liable for tortious interference in accordance with Florida law.

Petitioner has further failed to demonstrate that Florida law and public policy compelled him to launch his own personal and unauthorized investigation into an adverse incident that occurred at one of the District's hospitals. Moreover, this issue is wholly irrelevant to Petitioners claim against the District for tortious interference.

Petitioner has also failed to demonstrate that the Florida Supreme Court's dismissal of his Petition for Review constitutes a denial of due process and equal protection under the Florida and/or United States Constitutions. Because discretionary jurisdiction was nonexistent, the Florida Supreme Court properly dismissed his Petition.

Because Petitioner has failed to demonstrate that there are any compelling reasons for this Court to grant the Petition, the Petition should be denied.

REASONS FOR DENYING THE PETITION

A petition for a wit of certiorari will be granted only for "compelling reasons." Sup. Ct. R. 10. The decision of the Fourth District Court of Appeal did not decide an important question of federal law that has not been, but should be, decided by this Court. Nor did it decide an important federal question that conflicts with relevant decisions of this Court. To the contrary, the decision of the Fourth District Court of Appeal was based on established Florida tort law. Because Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted, the Petition should be denied.

I. THE FOURTH DISTRICT COURT OF APPEAL FOLLOWED FLORIDA LAW IN AFFRIMING THE TRIAL COURT'S SUMMARY JUDGMENT.

In Point One of his Petition, Rohart attempts to inject the issue of sovereign immunity into this case by disingenuously asserting that Florida's Fourth District Court of Appeal granted the District "absolute immunity" for tortiously interfering in Rohart's business relationship with his employer. [Petition, p. 8] Rohart's conclusion is wholly erroneous as the Hospital District was ***not*** granted absolute immunity, and the Fourth District Court of Appeal did not affirm the trial court's summary judgment based on sovereign immunity. Rather, the Fourth District and the trial court's decisions were based on established Florida tort law.

In granting summary judgment, the trial court expressly held that the Hospital District, as the source of the business relationship between Rohart and PEMB, could not be held liable for tortious interference in accordance with Florida law. Rohart appealed the trial court's summary judgment to the Fourth District Court of Appeal, who in turn affirmed the summary judgment citing two Florida cases that discuss in detail the tort of tortious interference with a business relationship. The first case cited by the Fourth District Court is a case styled *Palm Beach County Health Care Dist. v. Professional Medical Educ., Inc.*, 13 So.3d 1090 (Fla. 4th DCA 2009). Rohart erroneously contends that the court in *Palm Beach* granted the health care district "absolute immunity." Contrary to Rohart's assertion, the court held that, as an interested third party to the relationship, the health care district could not be held liable for tortious interference.[2]

In so holding, the court recognized that "[f]or the interference to be unjustified, the interfering defendant must be a third party, a stranger to the business relationship." *Id.* The court further recognized that a defendant is not a "stranger" to a business relationship if the defendant "***has any beneficial or economic interest in, or control over, that relationship.***" *Id.* [emphasis supplied] The court concluded that because the health care district was not a stranger to relationship, plaintiff's claim for tortious interference "fails because [the] 'interfering'

2. Although the court did hold that that an employee of the health care district was entitled to absolute immunity on the plaintiff's ***defamation*** claim, that portion of the court's holding is wholly irrelevant to the case at bar as there is no defamation claim and no District employee named in the action.

conduct was not unjustified, a required element of the tort."

Like the health care district in *Palm Beach*, in the instant action, the District was not a stranger to the business relationship between Rohart and PEMB. Pursuant to Section 1.2 of the Agreement between Rohart and PEMB, the District exercised "exclusive control or direction over the method and manner by which Physician [Dr. Rohart] performs professional service to the extent permitted by law." Thus, the District had a supervisory interest in how the relationship between PEMB and Rohart was conducted.

Moreover, the District had a financial interest in how the contract was performed. The Agreement called for Rohart to perform emergency medical services in the District's emergency room at Broward General Medical Center. Pursuant to the Agreement, payment for those services was made by PEMB "on behalf of the Operator [the District]." Pursuant to the agreement, Rohart was "at all times [] acting and practicing medicine as the agent of the [District]." The District had both a supervisory interest in how the relationship was conducted and a financial interest in how the contract was performed. Thus, the District cannot be held liable for tortious interference.

In affirming the trial court's summary judgment, the Fourth District also cited a case styled *Florida Telephone Corp. v. Essig*, 468 So.2d 543 (Fla. 5th DCA 1985). In *Essig*, Florida Telephone Corporation (FTC) hired H.L. Edwards Corporation (Edwards), as general contractor, to splice telephone cable. Edwards subcontracted the

cable splicing jobs to various independent cable splicers. The Essigs were independent splicers who subcontracted with Edwards to work on FTC jobs.

The contract between FTC and Edwards expressly stated,

> **The Telephone Company reserves the right to request the Contractor to promptly remove from the job any employee(s) of the Contractor or its sub-contractors who, in the sole opinion of the Telephone Company, is not doing an adequate job or is conducting himself in a manner as to reflect unfavorably upon the Telephone Company, and the Contractor agrees to comply with such requests.**

The Essigs brought suit against FTC for tortious interference with a business relationship. The court found that the Essigs failed to establish that FTC's actions were not privileged. Specifically, the court held that because "FTC expressly reserved the right to remove the Essigs, or any cable splicer, from FTC jobs; it was therefore privileged to interfere with their relationship with the H.L. Edwards Corporation, regardless of motive."

In the instant case, Rohart was hired by PEMB to work in the District's emergency room at Broward General Medical Center. As in *Essig*, the contract between Rohart and PEMB expressly reserved the District's right to request the termination of Rohart. Specifically, Section 6.2 of the Agreement provides:

> **This Agreement may be terminated at any time:**
>
> **(b) by the Company [PEMB] if it is notified by a responsible official of the Operator [the District] that the transfer or termination of the Physician [Rohart] is desired...the Company shall have the right to immediately terminate this Agreement and notify Physician that no further services are to be provided by Physician at Hospital and neither Company nor Operator shall have any further financial obligation to Physician as a result of such termination of services.**

(A.1, Tab A, p. 8) Thus, the District was privileged to interfere with the relationship between Rohart and PEMB. As recognized by the trial court and the appellate court, pursuant to Florida law a claim for tortious interference against the District simply cannot lie.

Rohart's assertion that the District's privilege to interfere "does not encompass the purposeful causing of a breach of contract" ignores the express language of the contract. (Petition, p. 12) To support his flawed assertion, Rohart relies on case law standing for the proposition that the privilege to interfere enjoyed by a party that is integral to the business relationship is not absolute. Rohart's reliance on these cases, however, is misplaced. Specifically, Rohart relies on *Morsani v. Major League Baseball*, 663 So.2d 653 (Fla. 2d DCA 1995). Procedurally, *Morsani* is distinguishable from the instant action as that case was decided at the motion to dismiss stage, and the case at bar was decided on summary judgment. In

Morsani, the trial court dismissed plaintiffs' complaint for tortious interference. The trial court found that, pursuant to plaintiffs' allegations, defendants had approval rights, and therefore, were the source of the business relationship. Thus, plaintiffs failed to state a cause of action for tortious interference. The Second District reversed, acknowledging that the privilege to interfere in a contract because of a financial interest is not unlimited, and thus, where there is a qualified privilege to interfere with a business relationship, the privilege carries with it the obligation to employ means that are not improper. Because plaintiffs alleged that defendants engaged in threats, intimidation and conspiratorial conduct, and because the trial court was required to take all well pled allegations as true, the court concluded that plaintiffs properly *stated a cause of action* for tortious interference. The instant action, however, was decided at the summary judgment stage. The trial court expressly found that Rohart "failed to come forth with any evidence...that [the District's] actions exceeded the scope of its privilege to protect its own business interests[.]" (App. B) The record was totally devoid of any evidence that the District employed means that were not proper. Thus, summary judgment was warranted.

Rohart also relies on *Burger King v. Ashland Equities, Inc.*, 161 F.Supp.2d 1331 (S.D. Fla. 2001). Like *Morsani*, *Burger King* was decided at the motion to dismiss stage, and because the plaintiff had made allegations of bad faith and improper motive, the district court for the Southern District of Florida held that the plaintiff stated a cause of action for tortious interference despite the fact that defendant had a limited privilege to interfere. Because *Morsani* and *Burger King* were decided at the dismissal stage, they have no bearing on the instant action and Rohart's reliance on them is misplaced.

The District was properly granted summary judgment in accordance with Florida tort law. Rohart's fallacious assertion that the District was granted "absolute immunity" is contradicted by the clear record in this case. Rohart's Petition should be denied.

II. PETITIONER WAS NOT REQUIRED BY LAW OR PUBLIC POLICY TO INVESTIGATE THE DEATH OF MRS. PLASS.

In Point Two of his Petition, Rohart erroneously asserts that §456.0575, Fla. Stat. (2009) and public policy required him to conduct an investigation into Mrs. Plass's death. First and foremost, this issue is wholly irrelevant to Rohart's claim against the District for tortious interference. Second, Rohart's assertion runs afoul of Florida law. In Florida, every licensed facility is statutorily required to establish an internal risk management program that includes provisions for the investigation and analysis of adverse incidents to patients. § 395.0197, Fla. Stat. (2009). The internal risk management program is the responsibility of the governing board of the health care facility. *Id.* Each licensed facility must hire a risk manager who is responsible for implementation and oversight of the facility's internal risk management program required by § 395.0197. *Id.* It is the risk manager's responsibility to conduct any investigation into adverse medical incidents. *Id.*

After the tragic death of Michelene Plass, the District's risk manager launched a proper investigation in accordance with Florida law. Rohart was acting contrary to Florida law when he launched his own personal investigation.

Rohart's reliance on §456.0575, Fla. Stat. (2009) to support his erroneous assertion that he was obligated to conduct his own private investigation is wholly misplaced. Section 456.0575 simply requires health care practitioners to ***inform*** the patient, or a proxy, about adverse incidents. Section 456.0575 cannot be interpreted to sanction a physician's personal investigation into an adverse incident. Rohart's contention that he was acting in accordance with § 456.0575 when he contacted Mrs. Plass's husband on September 16, 2006, nearly five months after her death, is simply disingenuous. Rohart's Petition should be denied.

III. AS AN INTERESTED THIRD PARTY TO THE BUSINESS RELATIONSHIP BETWEEN ROHART AND PEMB AND THE SOURCE OF THE BUSINESS OPPORTUNITY, THE DISTRICT CANNOT BE HELD LIABLE FOR TORTIOUS INTERFERENCE.

In Point Three, Rohart poses the question, "who is the source of the business relationship with which the Respondent interfered?" (Petition, p. 15) A Florida case styled *The Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683 (Fla. 3d DCA 1986) answers Rohart's question and clearly demonstrates that the District was in fact the source of the business relationship between Rohart and PEMB. In *Genet*, the plaintiffs contracted with a beer wholesaler to purchase the wholesalership. The wholesaler's agreement with Annheuser-Busch required Annheuser's approval for a transfer of the business. Annheuser did not approve the transfer and plaintiff sued for interfering with their contract with the wholesalership. The appellate court affirmed a summary judgment for Annheuser, holding that it was a "party to

the business relationship allegedly interfered with" and Annheuser's contractual right "to approve or disapprove any proposed transfer" rendered it an interested third party to the plaintiffs' agreement. *Id.* at 684. The court further found that, "what the Genets sought, through their agreement with Lopez, was to obtain an Annheuser-Busch wholesalership and enter into an Equity Agreement with Annheuser-Busch. Thus, Annheuser-Busch was the source of the business opportunity which plaintiffs sought." Summary judgment was therefore affirmed because the tort of willful interference with a business relationship does not exist where the defendant was the source of the business opportunity allegedly interfered with.

As in *Genet*, the District was not a stranger to PEMB's business relationship with Rohart. Pursuant to the Agreement between Rohart and PEMB, the District was an interested third party to the contract. What Rohart sought was the opportunity to work in the emergency room at one of the District's hospitals. Thus, the District was indeed the source of the business opportunity which Rohart sought, and as such, cannot be held liable for tortious interference.

In Point Three Rohart also contends that that the District could not be the 'source of the business relationship' between Rohart and PEMB because the District did not have the power to hire or fire him. (Petition, pp. 15, 16) Rohart's contention is negated by the express terms of the contract between Rohart and PEMB, which provided that the District had the authority to request the removal of Rohart from its emergency room. Notwithstanding his failure to acknowledge the express

terms of the Agreement, Rohart relies on *Albritton v. Gandy*, 531 So. 2d 381 (Fla. 1st DCA 1988) to support his flawed assertion. Rohart's reliance is misplaced.

In *Albritton*, the court held that although the defendant was a county commissioner for Escambia County, that fact did not make him a party to plaintiff's employment relationship with the county. In so holding, the court focused on the fact that county commissioners did not have the authority to hire and fire employees on behalf of the county as that was the responsibility of the county administrator. The court therefore concluded that Albritton, as a county commissioner, was not a party to the employment relationship between plaintiff and the county. Thus, a claim for tortious interference could be filed against him. *Id.* at 388. Because the District did have the power to request Rohart's termination, *Albritton* is not instructional in the instant matter. Rohart's Petition should be denied.

IV. THE FOURTH DISTRICT'S PER CURIUM AFFIRMANCE DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS OR EQUAL PROTECTON OF THE LAW.

In Point Four of his Petition, Rohart asserts that the Fourth District Court of Appeal "blocked further review of its decision by issuing a decision without an opinion." (Petition, p. 17) Rohart further asserts that the use of per curium affirmances by Florida appellate courts denies the citizenry of Florida constitutional and statutory rights. Rohart's assertions are in direct conflict with Florida law. The respective District Courts of Appeal in the State of Florida are courts of final appellate jurisdiction except

for a narrow classification of cases made reviewable by the Supreme Court. *Taylor v. Knight*, 234 So.2d 156 (Fla. 1st DCA 1970); *Greyhound Lines, Inc. v. Cory*, 279 So. 2d 104 (Fla. 4th DCA 1973). Appellants are not entitled as a matter of constitutional right to a written opinion from the appellate courts. *Taylor, supra.* As stated by the Second District Court of Appeal in *Taylor*:

> **[The district courts] were not established by the people of Florida as intermediate appellate courts or 'way stations' to the Supreme Court of Florida...This Court and not the attorney for the losing party is charged with the responsibility of deciding which cases merit and warrant a full written opinion upon the basis of that opinion's contribution to the jurisprudence of this State and those cases of great public interest...Appellants are not entitled as a matter of constitutional right to a written opinion from this Court in order that they might petition for writ of certiorari.**

Thus, the Fourth District's failure to issue an opinion and the ensuing dismissal of his Petition by the Florida Supreme Court does not constitute a denial of due process or equal protection.

Rohart's assertions also demonstrate his failure to grasp the nature of discretionary jurisdiction in the Florida Supreme Court. Rule 9.030 of the Florida Rules of Appellate Procedure provides that the discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that:

> **(i) expressly declare valid a state statute; (ii) expressly construe a provision of the state or federal constitution; (iii) expressly affect a class of constitutional or state officers; (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law; (v) pass upon a question certified to be of great public importance; (vi) are certified to be in direct conflict with decisions of other district courts of appeal.**

The Fourth District Court of Appeal's decision did not fall into any of the categories enumerated in the Rule, and thus, did not invoke the discretionary jurisdiction of the Florida Supreme court.

Rohart, however, contends that the cases cited in the Fourth District's decision "expressly and directly conflicts with a decision of another district court of appeal or the supreme court on the same question of law." Rohart, however, is in error. First, Rohart's contention is based on a flawed interpretation of the cases cited in the Fourth District Court of Appeal's decision. Contrary to Rohart's contention, *Palm Beach County Health Care District, supra*, one of the cases cited in the Fourth District's decision, ***did not*** grant the health care district absolute immunity on the plaintiff's tortious interference claim, as is made evident by a brief perusal of the case. In the instant action, it is clear beyond doubt that the District was not granted absolute immunity. The trial court expressly stated that summary judgment was based on the fact that the District was the source of the business relationship, an as such, cannot be held liable for tortious interference

in accordance with Florida law. Rohart's assertions to the contrary are disingenuous and must be disregarded.

Second, even assuming *arguendo* that the cases cited in the Fourth District's decision did actually conflict with other district court cases, discretionary review would not be possible because the Fourth District's decision did not address a question of law within the four corners of the opinion. In *Persaud v. State*, 838 So. 2d 529, 532-33 (Fla. 2003), the Florida Supreme Court explained that its discretionary review jurisdiction can be invoked only from a district court decision "that expressly addresses a question of law within the four corners of the opinion itself" by "contain[ing] a statement or citation effectively establishing a point of law upon which the decision rests." *Id., citing, Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988). This is because "there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before the Florida Supreme Court, or has been reversed on appeal or review, or receded from by the supreme court, or unless the citation explicitly notes a contrary holding of another district court or of the Florida Supreme Court." *Florida Star*, at 288 n. 3. In those cases where the district court has not explicitly identified a conflicting decision, it is necessary for the district court to have included some facts in its decision so that the question of law addressed by the district court in its decision can be discerned by the Florida Supreme Court. *See Reaves v. State*, 485 So.2d 829, 830 (Fla.1986) (noting that "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision").

The Fourth District's decision did not effectively establish a point of law upon which its decision rested. Thus, the Florida Supreme Court would not have been able to discern a conflict between the Fourth District's decision or the cases cited therein, with that of another district court or the Florida Supreme Court even if one had existed.

Rohart further contends that the Fourth District "refused to issue an opinion when requested, as allowed by the Rules of Appellate Procedure." (Petition, p. 17) The Rule to which Rohart is referring provides that "[w]hen a decision is entered without opinion, and a party believes that a written opinion would provide ***a legitimate basis for supreme court review***, the motion [for rehearing] ***may*** include a request that the court issue a written opinion." Rule 9.330, Fla.R.App.P. [emphasis supplied] As previously demonstrated, there is nothing in Florida law that requires the District Court to comply with a litigant's request for an opinion. Moreover, because no conflict was present in this case, Rohart had no basis for Florida Supreme Court review. Thus, an opinion would have been futile. Rohart's assertion that the Fourth District's failure to comply with his request for an opinion constitutes a denial of due process and equal protection is wholly without merit.

CONCLUSION

Petitioner has failed to establish a compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

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No. 10-683

In the
Supreme Court of the United States

PAUL O. ROHART, M.D.,
Petitioner,

v.

NORTH BROWARD HOSPITAL DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, FLORIDA

REPLY TO BRIEF IN OPPOSITION

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POINT ONE: CORRECTIONS TO RESPONDENT'S STATEMENT OF FACTS

Respondent states that Dr. Rohart "was at all times acting as an agent and practicing medicine as an agent of the District and the District exercised exclusive control over the method and manner Rohart performed physician services."

This is incorrect.

This issue had been previously decided in *Robinson v. Linzer, D.O.*, 758 So.2d 1163 (Fla. 4th DCA 2000). In this case a physician and his employer, Coastal Emergency Services of Hollywood, Inc. [a predecessor to Phoenix Emergency Medicine of Broward, LLC (PEMB) and under the same ownership] had their summary judgment reversed because the court found that the "Hospital District and Coastal were, by their contract, attempting to create an agency status." The Court found no agency status, because the control the District had over the physician did not support an agency status. The physician had the right to admit and the state had no right to control decisions regarding patient care.

The Court also found that the Coastal contract provided "that the emergency room medical director, who was hired and employed by Coastal, is responsible for the day-to-day management and supervision of the emergency room physicians, Coastal hires and pays the salaries of the emergency room physicians." *Robinson* at 1163.

The Director of the Respondent's emergency room was a PEMB employee who directly supervised the PEMB emergency room physicians as in the *Robinson* case. PEMB hired and paid the salaries of the emergency room physicians as in the *Robinson* case. PEMB scheduled the work of Dr. Rohart. Dr. Rohart had the right to admit patients and make medical decisions without state control.

Dr. Rohart was not an agent of the Respondent, nor was the Respondent in exclusive control over the method and manner Dr. Rohart performed physician services.

Respondent states that "Rohart told Mr. Plass not to sign any settlement papers with the District and that he had a lawyer for him. Rohart also asked Mr. Plass if he would speak with Rohart's attorney."

This is incorrect.

Dr. Rohart did speak with Mr. Wooden, Ms. Plass's spouse, on September 15, 2006. At that time, Mr. Wooden told Dr. Rohart that he executed a settlement agreement, for $200,000.00, with the Respondent on August 11, 2006, and that Dr. Rohart was to be terminated because of Ms. Plass's death. Dr. Rohart, who had no responsibility for his patient's death, was shocked. He did, at that time, ask Mr. Wooden if he would tell Dr. Rohart's attorney about the termination. Mr. Wooden agreed and told Dr. Rohart's attorney the same thing. Both Dr. Rohart and his attorney, Mr. Lon Engel, had signed affidavits to this effect in November of 2006.

Dr. Rohart, by affidavit, has stated that he <u>did not</u> tell Mr. Wooden not to sign a settlement agreement and that he had a lawyer for him. How

could Dr. Rohart tell Mr. Wooden not to execute a settlement agreement, on September 15, 2006, when Mr. Wooden had already told Dr. Rohart that he had executed the agreement on August 11, 2006? The Respondent has produced no evidence from Mr. Wooden stating that Dr. Rohart made the alleged statements.

Respondent states: "Petitioner's assertion that the administration of the lethal dosage of medication was 'intentional' has no support in the record and is one of many egregious allegations Petitioner has made during the pendency of this case."

This is incorrect.

The nurse had given Ms. Plass 10 times the dose that had been ordered. The nurse had to "round up 32 vials of the drug. Plass died in minutes." (Exhibit F of 3rd Amended Complaint).

To "round up 32 vials" of a medication and to infuse it into a patient cannot be an accident. Each vial contained 250 milligrams of the medication, Dilantin. A vial is approximately the size of a salt shaker. A nurse would not accidently give a patient a rapid infusion of 8 grams of Dilantin. Petitioner's statement is not egregious. It is accurate.

POINT TWO: FLORIDA LAW SUPPORTS PETITIONER

The Respondent states that the Fourth District did not affirm the trial court's summary judgment based on sovereign immunity, but that the decision was based solely on tort law. The Respondent states: "Contrary to Rohart's assertion,

the court held that, as an interested third party to the relationship, the health care district could not be held liable for tortious interference."

Because of Respondent's improper and unjustified actions, claiming to be an "interested party" to an employment relationship is not a valid defense for tortious interference.

In *McCurdy v. Collis*, 508 So.2d 380 (Fla. 1st DCA 1987), McCurdy appealed from an order granting summery judgment to J.C. Collis and Exxon with respect to McCurdy's claim of tortious interference with a business relationship. The court reversed in McCurdy's favor:

> "In those circumstances in which there is a qualified privilege to interfere with a business relationship, the privilege carries with it the obligation to employ means that are not improper. *Peacock v. GMAC*, 432 So.2d at 144-145; *Babson Bros. Co. v. Allison*, 337 so.2d 848, 850 (Fla. 1st DCA 1976), cert. denied, 348 So.2d 944 (Fla. 1977). In other word, the privilege does not encompass the purposeful causing of a breach of contract. *Yoder v. Shell Oil Company*, 405 So.2d 743,744 (Fla. 2d DCA 1981); Restatement of Torts (2d), s. 777 (1977)." *McCurdy* at 384.

Respondent purposely and improperly caused Dr. Rohart's employment contract to be breached.

As support for its decision, the District Court in *Palm Beach Cnty. Health Care District v. Professional Medical Education, Inc.* at 1095, states:

"An interested third-party accused of tortious interference is essentially 'interfering' with its own interests. This is not interference; it is freedom of contract." The application of contract law does not support, and actually erodes, the Respondent's argument.

"The right to interfere in contractual relations, as granted to interested parties, is qualified by the obligation of good faith." ... See *Morsani*, 666 So.2d at 657; *Yoder v. Shell Oil Co.*, 405 So.2d 743, 744 (Fla. 2d DCA 1981).

Every contract contains an implied covenant that the parties will perform their respective obligations in good faith and fair dealing. *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So.2d 1049, 1050 (Fla. 1997). Parties cannot contract around the implied covenant of good faith and fair dealing, even if the contract provides that a particular decision is in the sole discretion of one of the parties. *Sepe v. City of Safety Harbor*, 761 So.2d 1182, 1185 (Fla. 2d DCA 2000). "Where the terms of the contract afford a party substantial discretion to promote that party's self interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party." *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999); *Publix Super Markets, Inc. v. Wilder Corp. of Del.*, 876 So.2d 652, 654 (Fla. 2nd DCA 2004). Respondent's arbitrary and capricious acts of forcing Dr. Rohart's two terminations, based upon unverified facts and as a means of subverting his duty to

investigate his patient's unexplained death, were intentional, improper, unjust and unfair.

Dr. Rohart did not have an expectation that he would be forced from his employment for 1) doing his duty as a physician, and 2) speaking to the deceased's patient's spouse. He had an expectation that he would be treated fairly.

The Respondent asserts that *Fla. Tel. Corp. v. Essig* grants the Respondent the right to interfere with the agreement between Dr. Rohart and his employer, Phoenix Emergency Medicine of Broward, LLC, without any consideration for whether or not the Respondent's conduct was proper.

Fla. Tel. Corp. v. Essig does not address the application of a limitation on a claimed privilege, the obligation of an interested party to act properly, justly and fairly.

The facts in the instant case differ from those of the *Fla. Tel. Corp.* case. Dr. Rohart has contested that Respondent was "privileged to interfere ... regardless of the motive."

Parties cannot contract around the implied covenant of good faith and fair dealing, even if the contract provides that a particular decision is in the sole discretion of one of the parties. *Sepe v. City of Safety Harbor* at 1185.

Respondent maintains that Dr. Rohart's reliance upon *Morsani* and *Burger King* is misplaced because they were decided at the dismissal stage and not at summary judgment. Both *Morsani* and *Burger King's* substantive law is recognized and relies upon *McCurdy v. Collis*, 508 So.2d 380, 384 (Fla. 1st DCA 1987) which is a reversal of a summary judgment

that states where there is a qualified privilege to interfere with a business relationship, the privilege carries with it the obligation to employ means that are not improper.

The Respondent states that "the record was totally devoid of any evidence that the District employed means that were improper." This is incorrect. The Petitioner did produce evidence, but it was ignored. Also, after being ordered by the court, the Respondent refused to respond to a single discovery request for a year prior to its motion for summary judgment.

POINT THREE: PUBLIC POLICY REQUIRED THE PETITIONER TO INVESTIGATE

Respondent claims that § 395.0197, Fla. Stat. dictates that only a risk manager in a hospital is to conduct any investigation into adverse medical incidents, and that the Petitioner "was acting contrary to Florida law when he launched his own investigation."

Actually, Florida law and public policy require the Petitioner to investigate. Florida is one of the few states that explicitly mandate the participation of physicians in adverse medical incident reporting programs. According to §395.0197(1)(e), Fla. Stat., it is " . . . *the affirmative duty of all health care providers and all agents and employees of the licensed health care facility to report adverse incidents* . . ." An unexplained death of a patient, in the Respondent's emergency department, would require that the patient's physician investigate to

determine the cause of death, and to determine if the death was an adverse incident.

§395.0197, Fla. Stat., does not state that a physician cannot investigate the unexplained death of a patient.

Petitioner references § 456.0575, Fla. Stat., and § 765.401(1)(b), Fla. Stat., to support that the Petitioner had a right to talk to the deceased patient's spouse, and that termination for talking to the deceased patient's spouse was unjustified. There is nothing disingenuous about this.

POINT FOUR: RESPONDENT WAS NOT THE SOURCE OF PETITIONER'S EMPLOYMENT RELATIONSHIP

The Respondent uses *Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683 (Fla. 3rd DCA 1986) to support its claim that the Respondent was "the source of the business relationship between Rohart and PEMB" and also an interested party.

The 11th Circuit Court of Appeals, in reviewing the issue of conduct of an interested party and responding to the *Genet* case, has stated: "[t]he significant inquiry to determine the privilege of justification is whether the means employed are not proper." *KMS Restaurant Corp. v. Wendy's Intern., Inc.*, 361 F.3d 1321, 1327 (11th Cir. 2004). The *KMS* Court found that actions alleging tortious interference for an improper purpose, as opposed to cases in which no assertion of impropriety is made, raise the question of whether the interfering party has gone beyond its

limited and qualified privilege. The *KMS* Court remanded the case with the message that "further proceedings should take as given that use of improper methods may support a tortious interference claim even when the defendant did not act solely out of malice." *KMS* at 1328.

> "As to the justification or privilege element, when the district court first granted summary judgment for *Wendy's* in July 1998 it reasoned that *Wendy's* could not be held liable for tortious interference because as the source of the business opportunity it was privileged to interfere. In reaching that conclusion, the district court relied on *Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683 (Fla. 3d DCA 1986), a case in which a franchisor, motivated entirely by business considerations, failed to approve a franchisee's proposed transfer, and was held to have acted within the scope of its privilege. *Id.* at 685.
>
> In KMS' first appeal, we surveyed the relevant Florida case law and said: "[W]e are of the opinion that a franchisor's privilege is limited and qualified. Whether the franchisor has gone beyond its limited and qualified privilege is generally a question for the trier of fact." *KMS I,* No. 98-5336,at 7-12, 2000 WL 177629. We remanded for further proceedings. *Id.* at 12, 14, 2000 WL 177629." *KMS* at 1325-26.

The Respondent claims that *Albritton v. Gandy* does not apply to the instant case "because the District had the right to request Rohart's termination." The verbiage in *Albritton* is specific: "In the instant case a county commissioner does not have the authority to hire and fire employees on behalf of the county. Rather the person with such authority is the county commissioner. Therefore, it cannot be said that Albritton is a party to the employment relationship, and an action for tortious interference may be filed against Albritton." *Albritton v. Gandy*, 531 So.2d 281, 388 (Fla. 1st DCA 1988); *King v. State of Florida*, 650 F.Supp.2d 1157, 1168 (N.D. Fla. 2009). Only Dr. Rohart's employer, Phoenix Emergency Medicine of Broward, LLC had the power to hire and fire Dr. Rohart, as evidenced by his employment by PEMB, and the two termination letters he was issued by Phoenix Emergency Medicine of Broward, LLC. Respondent did not have the authority to hire or fire Dr. Rohart and could, therefore, not be a party to the employment relationship.

POINT FIVE: THE FOURTH DISTRICT COURT OF APPEAL AFFIRMANCE IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION

Respondent ignores the issue that a court applying incorrect law to admitted facts is a denial of due process and equal protection. *Mathews v. Metropolitan Life Insurance Co.*, 89 So.2d 641, 642 (Fla. 1956).

The verbiage of *Palm Beach County Health Care District* case specifically invokes absolute immunity for tortious interference:

> "As a caretaker of public money raised by taxes, the District has an interest in insuring that public funds are spent for a proper purpose and in seeing that the money is spent wisely and prudently. To allow the **tort of interference** to apply in this case would be to discourage the District from being an aggressive caretaker of public funds. Application of the tort to a situation involving a government agency's expenditure of funds 'would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949)(Hannd, J.) (in which the court discussed the doctrine of **absolute immunity** for the executive branch of government); see *McNayr*, 184 So.2d at 431 n. 12 (quoting Gregoire with approval). **For this reason, PME could not maintain a cause of action for tortious interference against the District.**" *Palm Beach Health Care District v. Prof. Med Educ.*, 13 So.3d 1090, 1094-95.

McNayr v. Kelley, 184 So.2d 428 (Fla. 1966) is a Florida Supreme Court case that addresses the question of absolute immunity. Footnote 12 is a quote of Justice Hand, concerning absolute immunity, which "effectively presents and disposes of

the arguments on both sides that it is again quoted in the footnote of this opinion." *McNayr* at 431.

Palm Beach Health Care District v. Prof. Med Educ. at 1095 specifically applies absolute immunity to the District. The above verbiage does not include defamation. Tortious interference is specified. Defamation is not a claim in the instant case.

The Fourth District would not have included citations if it did not want them to be included in the "four corners" of its decision. The Fourth District wanted its decision to rest on the law in these two cases.

Respondent states that Petitioner's request for an opinion from the Fourth District was unjustified because "no conflict was present in" the decision. Of course there were conflicts and there was a legitimate basis for Supreme Court review. Why have a rule allowing a request for an opinion if it is to be ignored?

"It seems to be settled law of this state that the duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have a remedy by due course of law ... if the judge fails or refuses to perform that duty." *State v. Smith*, 118 So.2d 792, 795 (Fla. 1st DCA 1960); *Mathews v. Metropolitan Life Insurance Co.*, 89 So.2d 641, 642 (Fla. 1956). If the court does not apply a "correct principle of law" to the admitted facts then Florida law acknowledges that due process and equal protection have been denied. **A denial of a request for an opinion, when due process and equal protection have**

been denied, is also a denial of due process and equal protection.

CONCLUSION

The Court should grant the Petition. If the Court does not grant plenary review, it should summarily reverse the Fourth District Court of Appeal decision and remand the case to the Circuit Court for further proceedings.

Respectfully submitted,

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